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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 703

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

RAY BERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI, AND BRIEF IN SUPPORT THEREOF.

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ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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SUPREME COURT OF THE UNITED STATES.

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vs.

RAY BERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a case based upon the Federal Employers' Liability Act, brought by respondent, Ray Berry, against petitioner, The Baltimore and Ohio Railroad Company, in

the Circuit Court of the City of St. Louis, Missouri, to recover the damages suffered by respondent occasioned by a severe injury sustained by him on February 10, 1926, by a fall from petitioner's trestle near Xenia, Illinois, while employed by petitioner as a rear brakeman on an interstate freight train of petitioner.

Respondent's petition shows that he and petitioner were engaged in interstate transportation at the time in question; that the trestle had no protective devices to prevent a person from falling therefrom; that the train stopped with the caboose on the trestle; that respondent was ordered to alight from the caboose; that it was nighttime and he, not knowing that the caboose was on the trestle, in pursuance of this order, stepped off the caboose, fell about twenty feet and sustained the injuries (R. 2-5).

The petitioner's answer contains a general denial, pleads assumption of risk by respondent and that his negligence was the sole cause of his injury (R. 6, 7, 72).

Trial was had before the Court and jury, and judgment rendered for $35,000. Appeal was perfected to the Supreme Court of the State of Missouri, where the judgment was affirmed in the sum of $20,000.

Respondent knew that the crew of the train had been ordered to take the passing track at Xenia to allow a train coming from the opposite direction to pass (R. 31, 80). The train's stop in question was made on the main line, with the caboose on the trestle, to allow the head brake-

man to open the passing-track switch in order that the train might enter the passing track (R. 31, 32, 41, 70, 80). A hot box on the train had been discovered before this stop was made (R. 13, 40), but it was not in a condition requiring early attention (R. 31, 32, 33). The order referred to in respondent's petition was an alleged order from petitioner's conductor to respondent while they were sitting in the cupola of the caboose to get out and go finish fixing the hot box, testified to by respondent (R. 31) and denied by the conductor (R. 40, 41). Respondent did step from the caboose while the train was so stopped, fell about twenty feet, and was injured. Respondent was an experienced brakeman (R. 30), familiar with the trestle (R. 17, 18, 31, 32) and all other matters involved.

The Supreme Court of the State of Missouri in its opinion (R. 69-86) found that there was nothing to show that the engineer was negligent in stopping the train with the caboose on the trestle (R. 74); that respondent was an experienced brakeman and was well acquainted with petitioner's tracks, road bed, as well as its equipment and method of operating its trains, etc. (R. 76); that respondent knew that the train must make the stop in question before passing onto the side track, and that ordinarily this stop being on the main line would be short and only long enough for the head brakeman to open the switch; that it would be the natural and proper thing to attend to the hot box when the train stopped on the pass-

ing track; that there is much reason to believe that the conductor would not order the respondent to fix the hot box at that place, and that the Court might surmise that the conductor only intended to remind respondent of his duty to look after the hot box as soon as the train passed onto the side track (R. 80).

The Supreme Court of the State of Missouri further held that the question of whether or not the conductor was negligent in giving the alleged order was a question for the jury (R. 80); that it was very dangerous to step off the caboose at the time in question (R. 71); that the ground of negligence on which a recovery was allowed was the negligence of the conductor in giving the negligent order to respondent to alight at this dangerous place (R. 75); that it was the duty of the conductor in making said order to ascertain whether the caboose stood in a reasonably safe place for respondent to alight, and that respondent had a right to rely on the conductor having performed this duty (R. 84). And that respondent did not assume the risk of his injury, basing that holding upon the proposition that this was not a usual and ordinary risk (R. 77), and that the order relieved him from assuming it (R. 77-80).

The only questions here raised are that the trial court should have directed a verdict in favor of the petitioner and should have withdrawn the allegation of negligence in respondent's petition covering the alleged negligent

order, and that the Supreme Court of the State of Missouri should have reversed the judgment because of the trial court's failure so to do. These questions were raised by petitioner's instruction in the nature of a demurrer to the evidence which was refused and exception duly saved (R. 44), and petitioner's instruction lettered "C" asking the withdrawal of this allegation of negligence which was refused (R. 53) and exception duly saved (R. 58).

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1.

There is not, under the applicable principles of law governing this class of cases, as interpreted and applied in the federal courts, that quantum of evidence in this record sufficient to submit this case to the jury on the question of whether or not petitioner's conductor, A. J. Dant, gave to respondent a negligent order at the time in question (R. 31, 41). And, this being a material element of respondent's case, a verdict should have been directed for petitioner by the trial court because of the failure in the required quantum of evidence in this respect; and the judgment of the trial court should have been reversed by the Supreme Court of the State of Missouri for this reason.

2.

There is not, under the applicable principles of law governing this class of cases, as interpreted and applied in the federal courts, that quantum of evidence in this record sufficient to submit this case to the jury on respondent's first allegation of negligence, to wit:

> "They negligently ordered, directed, caused and permitted plaintiff to alight from said caboose there, causing plaintiff's fall and injuries, as aforesaid, although they knew, or by the exercise of ordinary care would have known, of the aforesaid condition, and they negligently assured plaintiff of safety, although it was dangerous and not reasonably safe, as aforesaid" (R. 3).

And, this being a material element of respondent's case, this allegation should have been withdrawn by the trial court because of failure of the required quantum of evidence in this respect; and the judgment of the trial court should have been reversed by the Supreme Court of the State of Missouri for this reason.

3.

The trial court, in refusing to direct a verdict in favor of petitioner, and, in refusing to withdraw said first allegation of negligence; and the Supreme Court of the State of Missouri, in affirming the judgment of the trial court, for the causes above set forth in reason No. 1 and reason

No. 2, have decided a federal question in a way in conflict with the applicable decisions in this court in this class of cases on the question of the quantum of evidence legally required to permit the submission of a case to a jury. And each of said courts failed to apply the rules laid down on that question in the decisions of this Court in the cases of

C., M. & St. P. R. Co. v. Coogan, 271 U. S. 472-474;
Gulf M. & N. R. Co. v. Wills, 275 U. S. 455-457;
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165-168;
Gunning v. Cooley, 281 U. S. 90;
Southern Railway Co. v. Walters, 52 S. C. R. 58;

and other decisions of this Court.

4.

The evidence for respondent on the question of whether or not petitioner's conductor gave to respondent a negligent order (R. 31) which the trial court submitted to the jury and upon which the Supreme Court of the State of Missouri affirmed the judgment of the trial court, is insubstantial, insufficient and is wholly consistent with the theory that the conductor ordered respondent to look after the hot box in question after the train entered the passing track in question; and, therefore, under the evidence in this record and under the applicable principles of law governing this class of cases as interpreted and ap-

plied in the Federal Courts, the respondent failed to prove that material element of his case by the quantum of evidence required, and the trial court should have directed a verdict in favor of petitioner for this reason, and the trial court having failed so to do, the Supreme Court of the State of Missouri should have reversed the judgment of the trial court for this reason.

5.

The trial court, in refusing to direct a verdict in favor of petitioner on the grounds mentioned in above reason No. 4, and the Supreme Court of the State of Missouri, in affirming the judgment of the trial court, for the causes in reason No. 4 above set forth, have decided a federal question in a way in conflict with the applicable decisions of this Court in this class of cases on that question, and each of said courts failed to apply the rules laid down on that question in the decisions of this Court in the cases of Gunning v. Cooley, 281 U. S. 90-94; N. Y. C. R. Co. v. Ambrose, 280 U. S. 486-490, and other decisions of this Court.

6.

If it should be conceded that, under the federal rules, a jury question was raised by the evidence in this record on said first allegation of negligence and on the question of whether or not petitioner's conductor gave to respondent a negligent order at the time in question; still, under the

applicable principles of law governing this class of cases, as interpreted and applied in the federal courts, and under the evidence in this record, respondent, as a matter of law, assumed the risk of his injury. And, this being a material element of defense, a verdict should have been directed by the trial court in petitioner's favor, and the Supreme Court of the State of Missouri should have reversed the judgment of the trial court for that reason.

7.

The trial court, in refusing to direct a verdict in favor of petitioner on the ground that respondent assumed the risk, and the Supreme Court of the State of Missouri, in affirming the judgment of the trial court, have decided a federal question in a way in conflict with the applicable decisions of this Court in this class of cases on the question of when an experienced employe assumes the risk of injury, and each of said courts failed to apply the rules laid down on that question in the decisions of this Court in the following cases:

Chesapeake & Ohio Ry. Co. v. Kuhn, 52 S. C. R. 45;
Pryor v. Williams, 254 U. S. 43;
Missouri Pac. R. Co. v. Aeby, 275 U. S. 426-430;
Sea Board Air Line v. Horton, 233 U. S. 492-502;
Southern Pac. R. Co. v. Berkshire, 254 U. S. 415-416-418;
Jacobs v. Southern Ry. Co., 241 U. S. 229-236;
R. R. Co. v. Jones, 95 U. S. 439;

and other decisions of this Court. And the following decisions of other federal courts:

C. B. & Q. R. R. Co. v. Shalstrom, 195 Fed. 725-729 (C. C. A. 8th);
Chicago G. W. R. Co. v. Crotty, 141 Fed. 913-(C. C. A. 8th);
Union Pac. R. Co. v. Marone, 246 Fed. 916 (C. C. A. 8th);
Hogan v. B. & O. R. R. Co., 15 Fed. (2d) 729 (C. C. A. 6th.);
Hallstern v. Pa. R. Co., 30 Fed. (2d) 594 (C. C. A. 6th);
Southern R. Co. v. Logan, 138 Fed. 725 (C. C. A. 4th);

and other cases.

8.

If it should be conceded that, under the federal rules, a jury question was raised by the evidence in this record on said first allegation of negligence and on the question of whether or not petitioner's conductor gave to respondent a negligent order at the time in question; still, under the applicable principles of law governing this class of cases, as interpreted and applied in the federal courts, and under the evidence in this record respondent's negligence, as a matter of law, was the proximate and sole cause of his injury, and this being a material element of defense a verdict should have been directed in petitioner's favor by the trial

court and the Supreme Court of the State of Missouri should have reversed the judgment of the trial court for that reason.

9.

The trial court, in refusing to direct a verdict in favor of petitioner on the ground that respondent's negligence was the proximate and sole cause of his injury and the Supreme Court of the State of Missouri in affirming the judgment of the trial court have decided a federal question in a way in conflict with the applicable decisions of this Court in this class of cases on the question of when an experienced employe's injury is caused by his sole negligence; and each of said courts failed to apply the rules laid down on that question in the decisions of this Court in the following cases:

Great Northern Ry. Co. v. Wiles, 240 U. S. 444;
Frese v. C. B. & Q. R. Co., 263 U. S. 1;
Davis v. Kennedy, 266 U. S. 147;
Kansas City S. R. Co. v. Jones, 276 U. S. 303;
Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787.

PRAYER FOR WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, commanding that court to certify and

send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in a cause entitled and numbered on its docket, Ray Berry, respondent, against The Baltimore and Ohio Railroad Company, appellant, No. 29,577. That said judgment of the said Supreme Court of the State of Missouri may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

By RUDOLPH J. KRAMER,
BRUCE A. CAMPBELL,
Counsel for Petitioner.

MORISON R. WAITE,
WILLIAM A. EGGERS,
E. C. HARTMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No.....

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

RAY BERRY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

There was no opinion of the trial court in this case.

The opinion of the Supreme Court of the State of Missouri appears in the printed record, pages 69 to 86, inclusive. It is reported in 43 S. W. (2d), p. 782 (Advance Sheets No. 5, January 12, 1932). The case is not yet reported in official Missouri reports.

The Supreme Court of Missouri denied the motion for rehearing without opinion (R. 90).

II.

JURISDICTION.

1.

Jurisdiction of this Court is based upon Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Stats. 937; United States Code, Title 28, Paragraph (b), Section 344, permitting petitions for certiorari to be prayed for and issued to the highest courts of the various states where a title, right, privilege or immunity is specially set up or claimed under a statute of the United States.

The jurisdiction of this Court upon the Federal question involved is based upon the fact that this suit is brought solely under the Federal Employers' Liability Act of April 22, 1908, as amended, 35 Stats. 65 & 66; United States Code, Title 45, Sections 51 to 59, inclusive.

Some cases sustaining the jurisdiction are:

Sea Board Air Line Ry. Co. v. Horton, 233 U. S. 492-499;

Minneapolis, St. P. & S. St. M. Ry. Co. v. Goneau, 269 U. S. 406;

Gulf R. R. Co. v. Wells, 275 U. S. 455;

Atlantic Coast Line Co. v. Davis, 279 U. S. 34.

2.

The Supreme Court of the State of Missouri is the highest court of that state.

The original date of the judgment of the Supreme Court of the State of Missouri to be reversed is September 5, 1931 (R. 69).

Motion for rehearing was filed September 14, 1931, within the time provided by the rules of the Supreme Court of the State of Missouri (R. 87) and the motion for rehearing was denied November 20, 1931 (R. 90).

3.

Only two questions are raised in this court on this record. The first question is whether or not the trial court should have directed a verdict in favor of petitioner and whether or not the Supreme Court of the State of Missouri erred in not reversing the judgment of the trial court because of its failure to direct a verdict for petitioner. This question was raised by a proper instruction offered at the close of respondent's evidence (R. 33, 34) and by a proper instruction offered at the close of all of the evidence in the case (R. 44).

The second question is whether or not the trial court should have withdrawn the first allegation of negligence in respondent's petition (R. 3, 53, 58) and whether or not the Supreme Court of the State of Missouri erred in not reversing the judgment of the trial court because of its failure to withdraw that allegation of negligence.

III.

STATEMENT OF THE CASE.

This is a case based upon the Federal Employers' Liability Act, brought by respondent, Ray Berry, against petitioner, The Baltimore and Ohio Railroad Company, in the Circuit Court of the City of St. Louis, Missouri, to recover the damages suffered by respondent occasioned by a severe injury sustained by him on February 10, 1926, by a fall from petitioner's trestle near Xenia, Illinois, while employed by petitioner as a rear brakeman on an interstate freight train of petitioner.

The pleadings are an amended petition, amended answer to the amended petition, and the reply.

In respondent's amended petition it is alleged that petitioner is a corporation owning and operating a railroad as a common carrier engaged in commerce between the State of Illinois and other states, and as such in its business owned, operated, etc., and was using the thereinafter mentioned engines, cars, railroad equipment, roadbed, trestle and appurtenances.

That on or about February 10, 1926, respondent was in petitioner's employ as a brakeman and while engaged in his duties as such was upon a train of petitioner moving in interstate commerce from Illinois to the State of Indiana and transporting goods, etc., in interstate commerce, and that respondent and petitioner was then engaged in interstate commerce.

That petitioner, by its servants and agents, other than respondent, stopped said train near and west of Xenia, Illinois, with the caboose thereof on a trestle, having no railings or protective devices thereon to protect persons from falling therefrom; that the step of the caboose extended out to about the edge of the trestle, so that a person alighting from the caboose would fall from the trestle about twenty feet and sustain injuries; that the trestle and situation there was dangerous and not reasonably safe; that respondent in the night-time, not knowing that the caboose was on the trestle, acting pursuant to order, stepped off the caboose and fell about twenty feet and sustained injuries and damage. That respondent's fall and injuries directly and proximately resulted in whole or in part from the negligence of petitioner, its officers and agents, other than respondent, and by reason of and as a direct result of defects or insufficiencies, due to petitioner's negligence, in petitioner's cars, tracks, roadbed, works, etc., as follows:

1. They negligently ordered, directed, caused and permitted respondent to alight from the caboose there causing his fall and injuries, as aforesaid, although they knew, or by the exercise of ordinary care would have known of said condition, and they negligently assured respondent of safety, although it was dangerous and not reasonably safe as aforesaid.

2. They negligently caused and permitted the caboose to stop on the trestle as aforesaid, although they knew, or

by the exercise of ordinary care would have known that it was likely to cause injuries as aforesaid, and was dangerous and not reasonably safe.

(Three other grounds of negligence were alleged but upon the trial these were abandoned [R. 75] and the case went to the jury on the two grounds above mentioned [R. 72].)

That as a direct and proximate result of said negligence and carelessness respondent suffered severe injuries which are detailed, and alleging damages in the sum of $65,000 (R. 2, 5).

The petitioner's amended answer contains a general denial; pleads assumption of the risk by respondent, and that respondent's negligence was the proximate and sole cause of his injury (R. 6, 7, 72).

The reply is a general denial (R. 6, 7).

The case was tried at the February Term, 1928, before Honorable H. A. Hamilton, Judge, and a jury. On that day the jury returned a verdict in favor of respondent and against petitioner in the sum of $35,000, and the Court rendered judgment on the verdict.

In due time, on February 29, 1928, at the same term, petitioner filed its motion for a new trial. On June 25, 1928, at the June Term of court, the Court overruled the motion for new trial and refused to set aside the judgment. An appeal was duly taken to the Supreme Court of the State of Missouri. That appeal was duly heard in

that court, and on September 5, 1931, that Court affirmed the judgment in the sum of $20,000, on condition that respondent enter a remittitur of $15,000 within ten days (R. 69-86). Said remittitur was entered on September 11, 1931, and on that day the judgment was affirmed in the sum of $20,000 and costs (R. 87).

In due time on September 14, 1931, petitioner presented a motion for rehearing (R. 87-90) and on November 20, 1931, a rehearing was denied by the Court, no opinion being filed (R. 90).

The facts appearing upon the trial are that respondent was 32 years of age. He had been employed by petitioner as a railroad brakeman about nine years. During all that time he was employed on freight trains, his run being from East St. Louis to Beardstown or Shawneetown in Illinois, or from East St. Louis to Washington, Indiana. On each of these trips he was required to pass through Xenia, Illinois (R. 30). He was an experienced brakeman and was well acquainted with petitioner's road bed, equipment and its method of operating trains (R. 76, 80). The day in question was February 10, 1926. On that day respondent was working as a rear brakeman on his regular run on a freight train running in an easterly direction from East St. Louis, Illinois, to Washington, Indiana. The train consisted of an engine, tender, forty-two cars and a caboose (R. 12, 40). The crew consisted of an engineer, fireman, conductor, head brakeman who rode on the en-

gine, and respondent, the rear brakeman, who rode in the caboose with the conductor (R. 11).

The accident happened at about 4:30 a. m. at one of appellant's bridges or trestles a short distance west of the Village of Xenia. Xenia is a village of about 640 inhabitants. At this village petitioner has three railroad tracks, one main track, a passing track and a house track. The distance from petitioner's passenger station in Xenia to the west end of the switch leading from the main track to the passing track is 1,983 feet. The distance from the west end of this switch to the trestle in question is 1,945 feet. The western corporate line of the village of Xenia is about 100 feet east of this trestle (R. 39). This trestle is forty-one feet long and nine feet wide. It is the usual width of petitioner's bridges or trestles—just about the width of a caboose. It was equipped with no sidewalk or railing. Respondent knew this (R. 17, 18, 31, 32). There were sixty-five trestles or bridges between East St. Louis, Illinois, and Washington, Indiana. Between forty-five and fifty of these were similar to the one in question. There were five or six that had a sidewalk or railing on the side. All of the rest of them were without sidewalk or railing. The only bridges or trestles equipped with sidewalks or railings were those located so close to a switch that a man getting off the front end of the train to let it into the siding would have to walk over such trestle or bridge to open the switch. There was no sidewalk on any trestle

or bridge that was more than 300 feet from such switch (R. 35, 36).

Before the train reached the trestle in question the crew in charge of it had orders to go into the passing track at Xenia to wait there until another train coming from the east passed them (R. 31, 80). In making this movement into the passing track the train would stop near the passing-track switch. The head brakeman would get off the engine, go forward and open the switch, and the rear brakeman, respondent, would get off the caboose after it had passed the switch and go back and close the switch (R. 32, 38, 40, 74). The conductor, engineer and respondent each knew of these orders and each knew when this stop was made, the train then being on the main line, that it would be there long enough only to permit the head brakeman to open the switch (R. 31, 32, 41, 70, 80). The train waited on this siding about an hour before the other train arrived (R. 43). About four miles east of Xenia respondent and the conductor discovered a hot box on the train in question. Respondent testified that he saw the hot box blazing; that he called the conductor's attention to it, the train was stopped on the main line, they both went forward and looked at this hot box. That they had moved east about one mile from the place where the hot box was first discovered before that stop was made. That the conductor sent him to the engine to get a bucket of water to put out the fire; told him to tell the engineer that at the

next stop, at Xenia, they would finish fixing the hot box and that he conveyed that message to the engineer (R. 13). That the fire in the hot box was extinguished there west of Xenia (R. 31), and it did not reappear (R. 32, 33); that the train then moved eastward until it stopped for the purpose of having the switch opened so that it could pass into the passing track. This stop was made with the engine one and one-half to three car lengths from the passing-track switch, a usual and proper place to stop (R. 74). This placed the caboose on the trestle in question.

Respondent further testified that he and the conductor were in the cupola of the caboose when this stop was made and that the conductor said to him to get out and go and finish fixing the hot box (R. 31).

Respondent further testified that he knew at that time that the train was not on the passing track (R. 32); that after he received this order from the conductor he took his lantern and started to get off the caboose, walked down the caboose steps, thought he was stepping on the ground, but stepped off the trestle and fell about twenty feet (R. 13, 14).

The conductor, A. J. Dant, testified that the hot box was discovered by smelling; that he and respondent got down out of the cupola of the caboose, went to the rear platform of the caboose and hung out on the steps and looked up and down each side of the train, but couldn't see anything; saw no blaze and were not able to locate the hot box; that the train did not stop; that respondent did

not get off to examine the hot box, did not go to get any water, and that no stop was made until the stop in question, when they were intending to pass in the passing track; that after the stop in question was made he did not say anything to respondent with reference to the hot box; did not make any request of him with reference to the hot box and did not know that respondent intended to get off the caboose; that all he saw was that he saw the respondent get down out of the cupola and then afterwards heard him hallooing after he had fallen (R. 40, 41). There were no persons in the caboose other than the conductor and the respondent. The conductor expected to have the hot box fixed while the train was waiting on the passing track (R. 43).

At the close of respondent's evidence, petitioner submitted to the Court an instruction in the nature of a demurrer to the evidence, which was refused and exception duly saved (R. 33).

At the close of all the evidence, petitioner submitted a like instruction which was refused and exception duly saved (R. 44). Petitioner also submitted instructions asking the withdrawal of each assignment of negligence alleged in the petition, each of which was refused and exception duly saved (R. 53-58). As each assignment of negligence, other than the first and second, was abandoned on the trial, the refusal to withdraw the others did not constitute serious error (R. 75).

The trial court gave to the jury on behalf of respondent two instructions, the first of which was based upon the

first and second allegations of negligence and detailed the transactions in question in accordance with respondent's contention, and stated to the jury that if they found those things that their verdict must be in favor of the respondent. This instruction did not mention assumed risk, but did require a finding that respondent was in the exercise of due care (R. 45). The second was an instruction on damages (R. 47). To the giving of each of which an exception was saved.

The trial court also gave nine instructions requested by petitioner (R. 48-52).

The Supreme Court of the State of Missouri, in its opinion (R. 69-86), found that the alleged conversation between the respondent and the engineer was of no importance (R. 70, 74). That there was nothing to show that the engineer was negligent (R. 74); that respondent was an experienced brakeman and was well acquainted with petitioner's tracks, roadbed, as well as its equipment and method of operating its trains, etc. (R. 76). That respondent knew that the train must make the stop in question before passing onto the side track, and that ordinarily this stop, being on the main line, would be short and only long enough for the head brakeman to open the switch; that it would be the natural and proper thing to attend to the hot box when the train stopped on the passing track; that there is much reason to believe that the conductor would not order respondent to fix the hot box at that place; that the Court might surmise that the conductor only intended to remind respondent of his duty to

look after the hot box as soon as the train passed onto the side track (R. 80).

That there was no reversible error in the trial court's action in submitting the second allegation of negligence in respondent's petition to the jury because in submitting it by respondent's instruction on liability (R. 45, 46), the first and second grounds of negligence are connected with the conjunction "and" and the jury were required to find both grounds of negligence before they were justified in finding a verdict for respondent (R. 74), and that the ground of negligence on which a recovery was allowed was the negligence of the conductor in giving the negligent order to respondent to alight at a dangerous place (R. 75).

That the Court also held that the question of whether or not the conductor was negligent in giving the alleged order was a question for the jury (R. 80); that it was very dangerous to step off the caboose at the place in question (R. 71); that respondent was not guilty of negligence as a matter of law (R. 85); that it was the duty of the conductor in making said order to ascertain whether the caboose stood in a reasonably safe place for respondent to alight, and that respondent had a right to rely on the conductor having performed this duty (R. 84). And that respondent did not assume the risk of his injury, basing that holding upon the proposition that this was not a usual and ordinary risk and that the order relieved him from assuming it (R. 77-80).

IV.

SPECIFICATION OF ERRORS.

1.

The trial court erred in refusing to give and read to the jury the written request for the instruction in the nature of a demurrer to the evidence asked by petitioner at the close of all of the evidence offered in the case, which said instruction so offered and there refused by the trial court is in words and figures as follows, to wit:

> "At the close of the whole case the Court instructs the jury that under the law and the evidence your verdict must be for defendant" (R. 44).

2.

The Supreme Court of the State of Missouri erred in refusing to reverse the judgment of the trial court on account of the error of the trial court above set forth in specification of error No. 1.

3.

The trial court erred in refusing to give and read to the jury written instruction lettered C offered by petitioner, which said instruction so offered and there refused is in words and figures as follows, to wit:

"Among other things, plaintiff charges that the defendant was negligent in that plaintiff claims:

> " '1. They negligently ordered, directed, caused and permitted plaintiff to alight from said caboose there, causing plaintiff's fall and injuries as aforesaid, although they knew, or by the exercise of ordinary care would have known, of the aforesaid condition, and they negligently assured plaintiff of safety, although it was dangerous and not reasonably safe as aforesaid.'

"There is no evidence which under the law warrants you in finding against the defendant under this assignment, and it is therefore withdrawn from your consideration" (R. 53, 54, 58).

4.

The Supreme Court of the State of Missouri erred in refusing to reverse the judgment of the trial court on account of the error of the trial court above set forth in specification of error No. 3.

5.

The Supreme Court of the State of Missouri erred in affirming the judgment of the trial court.

6.

The Supreme Court of the State of Missouri erred in failing and refusing to reverse the judgment of the trial court.

V.

SUMMARY OF THE ARGUMENT.

1.

The trial court should have directed a verdict in favor of petitioner, and the Supreme Court of the State of Missouri should have reversed the judgment of the trial court on account of its failure so to do:

A. The evidence is not sufficient to submit the case to the jury on the question of whether or not the conductor gave a negligent order to respondent.

B. The alleged order to the respondent was not a negligent order.

C. Under any construction of the alleged order, respondent assumed the risk.

D. Under any construction of the alleged order, respondent's negligence was the proximate and sole cause of his injury.

2.

The trial court should have withdrawn the first allegation of negligence in plaintiff's petition (R. 3, 54, 55, 58) from the jury, and the Supreme Court of the State of Missouri should have reversed the judgment of the trial court on account of its failure so to do.

VI.

ARGUMENT.

1.

The Trial Court Should Have Directed a Verdict in Favor of Petitioner, and the Supreme Court of the State of Missouri Should Have Reversed the Judgment of the Trial Court on Account of Its Failure so to Do.

A.

The evidence is not sufficient to submit the case to the jury on the question of whether or not the conductor gave a negligent order to the respondent.

While the trial court refused to withdraw from the jury the second allegation of negligence (R. 54, 58), and the Supreme Court of the State of Missouri says that it would agree with our contention that the evidence does not justify the submission of this allegation of negligence if it stood alone and constituted a separate and independent ground on which recovery was predicated (R. 73-74), The Supreme Court further holds that the instruction (R. 45-46) on liability, given for respondent, submitted to the jury the first and second allegations of negligence together and required a finding on both before a recovery was justified; and that, as it was necessary to find that the caboose was stopped on the trestle, it was of no importance whether or not the same was negligently done.

That, therefore, there was no reversible error in refusing to withdraw this allegation of negligence from the jury. And the judgment was not affirmed on the ground that the second allegation of negligence was proved, but was affirmed on the ground that "the real ground of negligence, therefore, on which plaintiff was allowed to recover was the negligence of the conductor in giving the negligent order to plaintiff to alight at this dangerous place."

Respondent was an experienced employe in the position he had at the time of his injury. He had been so employed by petitioner on its freight trains about nine years, and during all that time his run passed over the trestle in question (R. 30). He was familiar with the trestle (R. 17-18, 31-32) and with petitioner's roadbed, equipment, methods of operating trains, etc. (R. 76, 80). Before the train reached this trestle the train crew had orders to take the passing track at the Village of Xenia and to wait there until a westbound train passed them. Respondent knew of these orders and he then knew that this train intended to take the passing track at that village (R. 31-32, 41, 70, 80). More than that he knew at the time the train made the stop in question that it was not on the passing track; that it had made this stop in order to take the passing track, and that it would remain there on the main line only long enough to permit the head brakeman to get off the engine and open the switch for the passing track (R. 32, 70, 80). He also knew that the train would be compelled to wait on the passing track for the other

train that it was to meet. Even if he is correct in his testimony with reference to the hot box blazing, that stop was made about three miles from the Village of Xenia. The fire was entirely extinguished (R. 31, 32, 33). He knew there was no special need of hurry with reference to this hot box. The message to the engineer that he says he conveyed for the conductor was not that the hot box would be fixed at the next stop, but it was that it would be fixed at the next stop at Xenia (R. 13). Respondent, therefore, could not have supposed, under any circumstances, that they would fix the hot box until the train was on the passing track at Xenia.

At the time the alleged conversation took place the conductor and respondent were both sitting in the cupola of the caboose (R. 31). The conductor denied that any conversation took place (R. 40-41). These matters being true, then it seems to us that his statement that the conductor ordered him to get out and finish fixing the hot box while the stop in question was being made, and that he then attempted to obey the order, is so contrary to what an experienced brakeman would understand and do, and is so contrary to what could possibly have happened that it does not amount to reasonable evidence, and is so insubstantial and insufficient that it did not justify a submission of that issue to the jury under the decisions of this Court.

Under the federal rules a scintilla of evidence is not sufficient. There must be reasonable and substantial evi-

dence for the plaintiff before the case can be submitted to the jury. The evidence in favor of the plaintiff must be of such a substantial character that if a verdict were returned for the plaintiff the Court would not have to set it aside in the exercise of sound judicial discretion. If the Court, even with conflicting evidence, in the exercise of sound judicial discretion, ought to set aside a verdict for the plaintiff, if rendered, then, under such circumstances, a verdict should be directed in favor of the defendant.

Barrett v. Virginian R. Co., 250 U. S. 473-476;
A. B. Small Co. v. Lamborn & Co., 267 U. S. 248-254.

In order legally to permit the submission of a case to the jury there must be reasonable evidence to show the breach of duty by the defendant.

Delaware R. Co. v. Koske, 279 U. S. 7.

The evidence for the plaintiff must be substantial evidence before the case can be submitted to the jury.

Atlantic Coast Line v. Davis, 279 U. S. 34.

B.

The alleged order to respondent was not a negligent order.

If it be assumed that the alleged order of the conductor to respondent was given, it was not a negligent one. The

conductor and respondent then were both sitting in the cupola of the caboose. Each had an equal opportunity to judge as to the conditions. Respondent's experience was equal to that of the conductor. In fact, respondent's knowledge of every circumstance involved was equal to that of the conductor. To get out of the caboose did not mean to step off the caboose to the ground. The car on which the hot box was could have been easily reached by passing over the rear cars. But an experienced brakeman could understand such an order to mean only to attend to fixing the hot box after the train passed onto the passing track, and could understand such an order to be only a reminder to do that work at that time.

In the case of C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, on page 474 of the opinion, in a case of this kind, it is said:

> "The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This Court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was the cause of the death, judgment against the carrier will be reversed."

And on page 478 of the opinion it is said if the record

leaves the matter in the realm of speculation and conjecture then a verdict should be directed.

In the case of N. Y. C. R. Co. v. Ambrose, 280 U. S. 486, on page 490 of the opinion it is said:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. * * * It is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. * * * If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from the settled rules of proof resting upon plaintiffs."

In the case of Gunning v. Cooley, 281 U. S. 90, on page 94 of the opinion it is said:

> "When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither."

Under these authorities we submit that respondent has wholly failed to prove that he was required to alight from the caboose at the time in question.

C.

Under any construction of the alleged order, respondent assumed the risk.

That respondent was experienced and had equal knowledge with the conductor is not denied. But the Supreme Court of the State of Missouri held that this was an extraordinary risk; that while it was not necessary to say that the doctrine of assumed risk never applies to a negligent order of the master, that it did not apply under the facts of this case (R. 77). That, under the circumstances, respondent was not required to investigate the possible danger and find out whether he could safely obey such order before doing so (R. 80, 81). That respondent had the right to rely upon the superior authority and knowledge of the conductor, and to assume that he would not order respondent to alight from the caboose unless at a place where he could safely do so (R. 81). That it was the duty of the conductor to get down from the cupola and investigate the situation under the caboose before giving the order, and that respondent had the right to rely upon the proposition that the conductor had done this (R. 84). Yet the evidence shows that the respondent knew the conductor never moved from the seat in the cupola (R. 31, 41).

We also respectfully submit that the Supreme Court of the State of Missouri confuses assumed risk and contribu-

tory negligence (R. 79), while they are clearly distinguishable.

Schlemmer v. B. R. & P. R. Co., 220 U. S. 590-596.

We submit that the effect of an order of the kind involved in this case on the doctrine of assumed risk as ruled by the Supreme Court of the State of Missouri in this case and the cases cited in the opinion is not the law in the federal courts. This case does not involve an assurance of safety. It does not involve a situation where the conductor, by his experience, training, education, etc., had a knowledge superior to that of the respondent, and we submit that no such distinction as was made by the Court in this case is made in the federal courts.

In the case of C. & O. Ry. Co. v. Kuhn, 52 S. C. R. 45, the employe was an experienced section hand. The order was given to him and the other section men by the assistant foreman in charge of them. The employe was ordered to use a defective sledge hammer and chisel, the job was a hurry-up one. The assistant foreman in charge told the men "to gang up and go in a hurry; that he wanted to get through there." "Don't be afraid." And it was held that a verdict should have been directed because the employe assumed the risk.

In the case of R. R. Co. v. Jones, 95 U. S. 439, a section foreman and his gang were leaving for home on a train. The plaintiff, a section man, was ordered by the foreman

to jump on the train anywhere; that they were behind time and must hurry. The plaintiff, instead of going inside a car, rode on the pilot of the locomotive, and it was held that he could not recover.

In the case of Pryor v. Williams, 254 U. S. 43, the plaintiff was engaged in tearing down a bridge. He was ordered by his foreman to use a defective claw bar. He contended that in obeying the order of the foreman he did not pause to make an inspection, but used the tool without any but a casual inspection, which did not reveal the defect. And in that case it was held that the doctrine of assumption of risk did apply.

In the case of Southern R. Co. v. Logan, 138 Fed. 725 (C. C. A. 4th), a conductor was injured in moving a dining car ahead of the engine; he was instructed by his superior, the yardmaster, to so handle the car, and yet it was held that he assumed the risk.

In the case of Chicago Great Western R. Co. v. Crotty, 141 Fed. 913 (C. C. A. 8th), a brakeman was ordered by the conductor, his superior officer, to move a car by means of a stake and was injured in so doing, and in that case it was held he assumed the risk.

In the case of Union Pac. R. Co. v. Marone, 246 Fed. 916 (C. C. A. 8th), a section man was directed by his foreman to cut a steel rail in a certain way. The section man objected to doing the work without goggles to protect his eyes. He was directed by his foreman to "go on, that's

all right, we never use them." And in that case it was held that he assumed the risk.

In the case of Hogan v. B. & O. R. R. Co., 15 Fed. (2) 739 (C. C. A. 6th), a car repairer was required to do certain work repairing cars. He requested that a proper instrument be furnished him. His foreman refused and required him to use a long wrench which was an unsafe appliance. And in that case it was held he assumed the risk.

In the case of Hallstern v. Pennsylvania R. Co., 30 Fed. (2) 594 (C. C. A. 6th), a railroad employe was ordered by his foreman to install an electric light on a coal tipple. Plaintiff demanded a safety belt, but he was ordered by the foreman to proceed without a belt. It was contended on account of the order that the doctrine of assumption of risk was inapplicable. But it was held that the doctrine did apply.

We submit that under the facts in this case, although the conductor was superior in authority, he did not have any knowledge superior to that of the respondent, and that, under the facts in this record, it ought not to be held that respondent could rely upon the proposition that the conductor did have superior knowledge; and that, under the authorities above cited, the Supreme Court of the State of Missouri is in error in holding that the mere fact that such order was given relieved respondent of the assumption of the risk.

D.

Under any construction of the alleged order respondent's negligence was the proximate and sole cause of his injury.

The Supreme Court of the State of Missouri held that in view of the darkness and the small lantern carried by respondent, which alone gave any light, it could not be held that respondent was negligent as a matter of law, and it further held that if it was so decided that this would be only contributory negligence and not defeat respondent's action (R. 85). It is true that negligence of an employe in this class of cases may be only contributory negligence and may amount to no more than diminution of damages, but it is also true in this class of cases that an employe's negligence may be the proximate and sole cause of his injury.

Great Northern Ry. Co. v. Wiles, 240 U. S. 444;
Frese v. C. B. & Q. R. Co., 263 U. S. 1;
Davis v. Kennedy, 266 U. S. 147;
Kansas City S. R. Co. v. Jones, 276 U. S. 303;
Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787.

It is true that this record does not show a situation with reference to respondent's negligence so clear as were the facts in most of the cases above cited, but in view of respondent's experience and knowledge, in view of the

situation as to the conductor and respondent when the alleged conversation took place, in view of the fact that the train was then on the main line and was almost in the act of passing onto the passing track, and the fact that there was no fire in the hot box, no hurry on that account, in our opinion there is no material difference between the facts in the case of Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787, and the facts in the case at bar on this point.

True, it was in the nighttime, but respondent was an experienced brakeman (R. 76). He had his lantern; it was an ordinary railroad lantern (R. 13). Of course, the rays would not shine directly down through the bottom of the lantern (R. 14). That would be true of any lantern. He knew the trestle was about the same width as the caboose (R. 17, 18, 31, 32). Respondent stepped from the caboose without the exercise of any kind of care or caution. The Supreme Court of Missouri does not hold that he exercised care, but it seems to assume that under the case of Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310, it was not necessary for respondent to exercise any kind of care (R. 79). And, although the conductor was sitting in the cupola of the caboose during all the time in question (R. 31, 41), the Supreme Court of Missouri excuses respondent's action on the theory that the conductor should have ascertained whether or not respondent could obey the order in safety, should have ascertained whether the caboose stood in a reasonably safe place for

respondent to alight, and that respondent had the right to rely on the conductor having performed that duty (R. 84), although respondent knew the conductor did not move from his seat.

We respectfully submit that there is no sound basis for such ruling and that the Supreme Court of Missouri erred in so holding.

2.

The Trial Court Should Have Withdrawn the First Allegation of Negligence in Plaintiff's Petition (R. 3, 54, 55) From the Jury, and the Supreme Court of the State of Missouri Should Have Reversed the Judgment of the Trial Court on Account of Its Failure so to do.

What has been said above in this argument applies to this point also. To argue this point is to go over the same ground. If we are correct in either of our contentions above made, then we are correct as to this.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors herein pointed out may be corrected and that the law may be properly and authoritatively defined. That the judgment of the Supreme Court of the State of Missouri in this case should

be reversed in order that justice may be done to petitioner, and that, to such end, a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Missouri and finally reverse it.

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APPENDIX.

Title 45, Chapter 2, Section 51, U. S. C. A.

Section 51. **Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employes From Negligence.**—Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or per personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. (April 22, 1908, c. 149, sec. 1, 35 Stat. 65.)

Ibid., Section 56. **Actions, Limitation, Concurrent Jurisdiction of Courts, Removal of Case in State Court.**—No

action shall be maintained under this chapter unless commenced within two years from the day the cause of action occurred.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be living at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this chapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States. (April 22, 1908, c. 149, sec. 6, 35 Stat. 66; April 5, 1910, c. 143, sec. 1, 36 Stat. 291.)

Ibid., Section 59. **Survival of Right of Action of Person Injured.**—Any right of action given by this chapter to a person suffering injury shall survive to his of her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury. (April 22, 1908, April 5, 1910, c. 143, sec. 2, 36 Stat. 291.)